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2014 IL App (3d) 120092-U

Order filed February 7, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF) Appeal from the Circuit Court
ILLINOIS,) of the 12th Judicial Circuit,
) Will County, Illinois,
Plaintiff-Appellee,)
) Appeal No. 3-12-0092
v.) Circuit No. 10-CF-966
)
CECIL CONNER,) Honorable
) Edward Burmila, Jr.,
Defendant-Appellant.) Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Lytton and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court's refusal to allow a witness to testify pursuant to a prior consistent statement was harmless error. (2) Defendant's sentence was not excessive.

¶ 2 Defendant, Cecil Conner, was convicted of aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(1), (d)(1)(F) (West 2010)), and sentenced to 9½ years in prison.

Defendant appeals, arguing: (1) the trial court erred when it ruled prior consistent statements made by a defense witness were inadmissible; and (2) his sentence was excessive. We affirm.

¶ 3

FACTS

¶ 4 Following an accident which occurred in the early morning hours on May 10, 2010, defendant was charged with aggravated DUI (625 ILCS 5/11-501(a)(1), (d)(1)(F) (West 2010)). Because the accident resulted in the death of another person, the charge was a Class 2 felony. The cause proceeded to a jury trial.

¶ 5 At trial, evidence established that at approximately midnight on May 10, 2010, Kathy LaFond, defendant's girlfriend, left her job and went to her home, where she changed clothes. Thereafter, she and her five-year-old son, Michael, left the house and drove to Jennifer Tartt's residence. Defendant was at the residence when LaFond and Michael arrived. At approximately 2 a.m., defendant, LaFond, and Michael left in a vehicle driven by LaFond. Both Tartt and LaFond testified that defendant was very intoxicated when he left Tartt's home. Tartt stated that she could smell alcohol from five to seven feet away from defendant. Before the group could reach their destination, LaFond was pulled over by Chicago Heights Police Officer Christopher Felicetti. After determining that LaFond's license was suspended, Felicetti placed her under arrest and gave the keys to defendant. Defendant left the scene with Michael still in the vehicle. At some point, defendant lost control of the vehicle and crashed. Michael was killed.

¶ 6 LaFond testified that when she was pulled over, the odor of alcohol was strong in the car due to defendant's intoxication. Further, she claimed that she told Felicetti she was the designated driver and informed him three times that defendant could not drive her car because he had been drinking. However, as she sat in the back of the police car, LaFond noticed her vehicle being driven away. Felicetti informed her that defendant and her son would meet them at the police station. At the station, LaFond signed some paperwork and was released on an I-bond

after about 15 minutes. When she went outside, she did not see her vehicle. She tried to call defendant from the station, but he did not answer. On cross-examination, LaFond testified that she had filed a lawsuit against the Chicago Heights police department 48 hours after the accident and that she was seeking monetary damages.

¶ 7 Felicetti testified that after placing LaFond under arrest, he questioned defendant to determine if he could turn the vehicle over to him. According to Felicetti, defendant did not appear intoxicated and answered his questions correctly and without slurring his words. Further, he stated that LaFond never told him that defendant was drunk. Although he did not order him to drive, Felicetti gave defendant the keys and allowed him to leave the scene. After giving defendant control of the vehicle, Felicetti did not contact any police officers to tell them to stop the vehicle. Felicetti then took LaFond to the police station.

¶ 8 After Felicetti testified that LaFond did not inform him that defendant was intoxicated, the defense attempted to admit testimony from Tartt to rehabilitate LaFond's testimony that she did tell him. According to the defense, Tartt would testify to a conversation the two had approximately one hour after the arrest, before LaFond or Tartt found out about the accident. In that conversation, LaFond allegedly told Tartt that she had told Felicetti that defendant was drunk. The trial court ruled that this prior consistent statement was not admissible.

¶ 9 As the trial continued, the State called Kevin Kutta as a rebuttal witness. Kutta testified that he was the security supervisor at the hospital to which Michael was taken. The night of the accident, he overheard a conversation between LaFond and Michael's godmother in which LaFond stated that she had asked Felicetti to let defendant drive her car. After this evidence was introduced, defendant again attempted to have LaFond's statements to Tartt admitted. However,

the trial court again ruled the statements were inadmissible after finding that they were made at a time when LaFond had a motive to lie.

¶ 10 At the conclusion of the trial, the court instructed the jury on the affirmative defenses of necessity and entrapment. After deliberations, the jury found defendant guilty of the offense. At the sentencing hearing, the trial court heard evidence in mitigation and aggravation. The evidence included defendant's lack of any prior adult or juvenile convictions. At the conclusion of the hearing, the trial court sentenced defendant to 9½ years in prison. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 I. Prior Consistent Statement

¶ 13 First, defendant contends that the trial court erred when it ruled that a prior consistent statement made by LaFond was inadmissible. There is a general rule that a witness may not be rehabilitated by admitting former statements consistent with her trial testimony. *People v. Heard*, 187 Ill. 2d 36 (1999). However, an exception to this rule applies to rebut an expressed or implied charge that: (1) the witness is motivated to testify falsely; or (2) her testimony is a recent fabrication. *People v. Williams*, 147 Ill. 2d 173, 227 (1991). See also *People v. Ruback*, 2013 IL App (3d) 110256. In order to gain admission of the prior consistent statement, defendant must show that the statement was made before a motive to falsify arose. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215 (2010).

¶ 14 In this case, LaFond testified on direct examination that she told Felicetti that defendant was drunk prior to his decision to let defendant drive the car. Thereafter, the State introduced contradictory evidence as well as evidence that defendant had a motive to lie based on a lawsuit

she filed against the police station. Following the admission of this evidence, defendant twice attempted to rehabilitate LaFond's testimony by offering a statement LaFond had made to Tartt after she left the police department but before she knew that an accident had occurred. The court twice ruled that the statement was inadmissible.

¶ 15 Based on the timing of the statement, we conclude that the statement was admissible under the exception to the rule which prohibits prior consistent statements. See *Cuadrado*, 214 Ill. 2d at 90. The statement was made before LaFond had a reason to testify falsely. Further, the statement was important evidence following the State's charge that LaFond had a reason to falsify her testimony; therefore, we conclude that the trial court's refusal to admit the statement was an abuse of discretion. However, we find that the trial court's error was harmless.

¶ 16 An error is harmless when it appears beyond a reasonable doubt that the error did not contribute to the verdict obtained. *People v. Stechly*, 225 Ill. 2d 246 (2007). There are three different approaches for determining whether an error is harmless: (1) focusing on the error to determine whether it might have contributed to the conviction; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction; or (3) determining whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *Id.*

¶ 17 In this case, we find that the trial court's denial of admission did not contribute to the verdict. Importantly, LaFond's statement was only useful to defendant with regard to his entrapment defense. After our review of the record, we have determined that the State presented overwhelming evidence that entrapment did not occur. See *People v. Arndt*, 351 Ill. App. 3d 505 (2004) (once an accused presents even slight evidence of entrapment, the State must prove the

absence of entrapment beyond a reasonable doubt). That evidence included the fact that Felicetti did not attempt to arrest defendant or have him arrested after he let him drive the car. Therefore, because we conclude that overwhelming evidence contradicted defendant's entrapment defense, we hold that LaFond's statement would not have resulted in a different verdict. Thus, any possible error in denying admission of the statement was harmless.

¶ 18

II. Excessive Sentence

¶ 19 Second, defendant argues that his 9½-year sentence was excessive due to the facts of the case and his lack of any prior convictions. The Illinois Constitution mandates that all penalties be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. The determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203 (2000). A sentence that falls within the statutory range does not amount to an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796 (2007). Although the reviewing court may reduce a sentence where an abuse of discretion has occurred, the reviewing court should proceed with great caution and care and must not substitute its judgment for that of the trial court simply because it would have weighed the factors differently. *Id.*

¶ 20 Because defendant's actions resulted in the death of one person, his conviction for aggravated DUI was a Class 2 felony punishable by not less than 3 years and not more than 14 years. 625 ILCS 5/11-501(d)(2)(G) (West 2010). Defendant's sentence of 9½ years was in the middle of the statutory range. Despite the fact that defendant originally had a designated driver

and had no prior convictions, we are unable to find that a midrange sentence in a case where a young child was killed was an abuse of discretion. Therefore, in light of the nature of the case and all of the factors presented at sentencing, we find that defendant's sentence was not excessive.

¶ 21

CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.